Supreme Court, U.S.
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No. 00-878

IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS AT&T COMMUNICATIONS OF ILLINOIS, INC. AND TELEPORT COMMUNICATIONS GROUP, INC.

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QUESTIONS PRESENTED

1. Whether a state commission's order that interprets or otherwise affects a previously approved "interconnection agreement" is a "determination under [section 252]" and thus reviewable in federal court under 47 U.S.C. § 252(e)(6).

2. Whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

PARTIES TO THE PROCEEDING

Petitioners are Richard L. Mathias, Terry S. Harvill, Edward C. Hurley, Ruth K. Kretschmer, and Mary Frances Squires, who are currently, and were at the time of the final order of the United States Court of Appeals for the Seventh Circuit denying rehearing (Pet. App. 1a-2a), the members of the Illinois Commerce Commission. At the time of the filing of the federal district court action in this case, the commissioners were Dan Miller, Richard Kolhauser, Ms. Kretschmer, Karl McDermott, and Brent Bohlen.

Respondents are: Illinois Bell Telephone Company d/b/a Ameritech Illinois; WorldCom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc.; MCI Telecommunications Corp.; MCImetro Access Transmission Services, Inc.; Focal Communications Corp.; Teleport Communications Group, Inc. ("TCG"); and AT&T Communications of Illinois, Inc. ("AT&T").

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, respondents TCG and AT&T disclose that they are both wholly-owned subsidiaries of AT&T Corp. AT&T Corp. has no parent company. No publicly held company owns more than 10 percent of AT&T Corp.'s stock.

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STATEMENT OF THE CASE

In the Telecommunications Act of 1996, Congress enacted a new subchapter of the Communications Act that seeks rapidly to introduce competition into local telephone markets that heretofore had been intractable monopolies. 47 U.S.C. §§ 251-261. These provisions preempt all state laws that could have the "effect" of preventing any firm from offering competitive local services, and they further impose a series of federal duties on the incumbent local exchange carriers ("incumbent LECs") that require them to share certain of their network facilities with prospective competitors.

These federal duties are expressed in very general terms, and there is nominally a three-step process for translating the general duties into concrete and enforceable legal rights. First, the Federal Communications Commission ("FCC") issues regulations that define the federal duties with greater specificity. Second, any willing state commission (or the FCC) establishes "interconnection agreements" that further specify the details of these federal network sharing requirements between incumbent LECs and each carrier who requests interconnection. Third, in the course of the implementation of any one interconnection agreement, there are proceedings in which the terms of the "approved" interconnection agreement will be interpreted, clarified, superceded, or modified and in which the incumbent LECs' obligations are made still more concrete. Questions whether the incumbent LEC has violated the Act or the FCC's regulations arise during each of the three steps in the process.

The three stages in the definition and implementation of the LECs' obligations are not discrete, but substantially overlap, both substantively and temporally. For example, there are pending proceedings in which the FCC is considering further modifications of its regulations, in which state commissions are interpreting previously approved interconnection

agreements or resolving "open issues" under them, and in which state commissions are arbitrating or reviewing new interconnection agreements that would supplement or supercede the previously approved agreements. For this reason, the interconnection agreements that are at issue in this case all expressly provide that the state commission retains jurisdiction to resolve issues arising under the agreement and provide for modification of the agreements in response to changes in the FCC regulations or other governing law.

The Act imposes a federal duty on incumbent LECs to comply with both the terms of their federal interconnection agreements and the substantive requirements of the Act. §§ 251(c)(2)-(3).[1] The Act expressly gives injured persons a federal private right of action (in either federal court or at the FCC) against an incumbent LEC who violates these or any other requirements of the statute. §§ 206-209. Because Congress invited individual state commissions to play a central role in establishing the interconnection agreements that are a primary vehicle for implementing and enforcing the incumbent LECs' new duties, the Act also provides another remedy that is at issue here: the provision of § 252(e) that allows federal court review of state commissions' interconnection agreement determinations.

This case presents a very narrow issue involving the scope of this § 252(e) remedy. As petitioners concede (Br. 18), § 252(e)(6) provides for exclusive federal court jurisdiction when a state commission issues a decision that *initially* approves or rejects an interconnection agreement, in whole or in part, and requires the federal court to determine if the agreement meets the requirements of the Act and the FCC's regulations. But petitioners claim that the Act requires a different result when, as here, a state commission has retained jurisdiction to resolve open issues or to interpret or modify

[1] Statutory cites are to Title 47 of the United States Code, unless otherwise indicated.

the agreement and when, as here, a state commission enters an order that further specifies the LECs' obligations under the agreement. In this event, petitioners claims that the state commission is not making "determinations under this section [252]," that the provisions of § 252(e) are inapplicable, and that any challenges to the state commission's order can only be maintained in state courts. Petitioners further claim that the Eleventh Amendment would dictate this result even if the statute were ambiguous.

As explained in detail below, petitioners' claims rest on a wholly artificial distinction that has no support in the statutory text, that is inconsistent with the structure of the Act and the other federal remedies that it creates, and that would severely impede the efficient and orderly administration of this important federal statute.

But to put these claims in their full context requires a more detailed description of (1) the new federal requirements adopted in 1996, (2) the rulemaking, interconnection agreement, and implementation proceedings that have occurred under this Act to date, (3) § 252(e) and the FCC's construction of it, and (4) the specific controversy that gives rise to this case.

1. In the 1996 Act, Congress set out to "end[] the longstanding regime of state-sanctioned monopolies" and "fundamentally restructure[] local telephone markets" so that they, like long distance services, could become effectively competitive. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 377, 378 n.5 (1999). The Act thus establishes a "new federal regime" designed to eliminate the legal and the economic impediments to local competition, *id.* at 379 n.6 (emphasis in original omitted), and "to shift monopoly [telephone] markets to competition as quickly as possible," H.R. Rep. No. 104-204, at 89 (1995).

Section 253 of the Act ends the legal barriers to local competition. It expressly preempts any state law that could

have the "effect" of preventing any firm from offering any telecommunications service. § 253(a).

Sections 251 and 252 of the Act address economic barriers to local entry. Congress recognized that the local networks of the incumbent LECs are characterized by tremendous economies of scale and scope, and that new entrants could not replicate all of the facilities required to provide ubiquitous local calling in any geographic area. Congress thus enacted a number of provisions that require each incumbent LEC to "share its network with competitors" on rates and terms that are just, reasonable, and nondiscriminatory. *AT&T Corp.*, 525 U.S. at 371. Incumbent LECs must, *inter alia*, allow potential competitors to: (i) "interconnect[]" with the incumbents' networks, § 251(c)(2), (ii) purchase "[u]nbundled access" to discrete elements of those networks at cost-based rates, §§ 251(c)(3), 252(d)(2), and (iii) purchase for resale any telecommunications services the incumbents provide to retail subscribers, § 251(c)(4). When competing and incumbent carriers interconnect, each must transport and terminate calls that originate on the others' network, and the originating carrier compensates the terminating carrier through payment of "reciprocal compensation." § 251(b)(5).

Congress legislated these new federal obligations of incumbent LECs. But Congress could not and did not prescribe the myriad technical and economic details necessary for new entrants to establish actual commercial arrangements for sharing the incumbents' facilities on the same terms and economic costs that the incumbents enjoy. Rather, Congress provided that the necessary technical details would be defined through a series of interrelated and overlapping proceedings, and Congress established explicit federal remedies that new entrants can employ at any stage of the process. Congress did so in recognition that incumbent LECs have no incentives to cooperate with potential competitors, but have both the incentive and the ability to seize on pretexts to deny competitors the arrangements that would allow them to

threaten the incumbent monopolies. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, **xxxx** ¶ 134 (1996), *aff'd. in part, vacated in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (hereinafter "*Local Competition Order*").

First, the FCC is authorized to adopt regulations to implement these and other provisions of the Act (§ 201(b)), and the Act required the FCC to adopt regulations to further define the requirements of § 251 within six months of the effective date of the 1996 Act (§ 251(d)(1)). By establishing minimum standards, these regulations would create conditions that could allow incumbent LECs voluntarily to agree to necessary arrangements and would facilitate the establishment of arrangements through arbitration when voluntary "interconnection agreements" are not reached. See *Local Competition Order* ¶ 41. In particular, the FCC's national rules establish a "clear statement of terms that must be included in every arbitrated agreement, absent mutual consent to different terms." *Id.*

Second, to translate the federal duties into still more concrete requirements, the Act authorizes the establishment of so-called "interconnection agreements" between the incumbent LEC and each prospective new entrant in an area. The Act requires the incumbent LEC to "negotiate" the terms of these agreements in "good faith" (§ 251(c)(1)) and where such agreements are reached, the Act assures their speedy approval. In particular, it allows an agreement to be reached "without regard to the requirements [of §§ 251](b) and (c)" and requires that the agreement be approved within 90 days unless the agreement "discriminates against a telecommunication carrier not a party to the agreement" or the "implementation of [the] agreement" is contrary to the public interest. § 252(a)(1), (e)(2)(A).

But when negotiations fail to produce complete agreements after 135 to 160 days, the Act provides that "open issues" are

to be resolved by "arbitration[s]" which the pertinent state commission may elect to conduct and that the FCC conducts if the state commission is unwilling to do so. § 252(b)(1), (c), (e)(1), & (e)(5). The Act provides that arbitrations are to be concluded within nine months of the commencement of negotiations, and provides that the state commission (or the FCC) is to approve or reject the resulting agreement within an additional 30 days. See § 252(b)(4)(A) & (c), (e)(4). Participating state commissions are required to ensure that arbitrated agreements meet the requirements of the Act and the FCC's regulations. See § 252(c)(1) & (e)(2)(B); *AT&T Corp.*, 525 U.S. at 373.

Even after they are "approved," interconnection agreements are wholly unlike common law contracts in numerous respects. Most fundamentally, a new entrant's interconnection agreement does not represent the exclusive source of its rights against the incumbent LEC. If a second new entrant thereafter obtains an interconnection agreement with more favorable rates, terms, and conditions, the first new entrant has a statutory right to avail itself of those more favorable terms and to disregard the terms of its "own" interconnection agreement. See § 252(i); *AT&T Corp.*, 525 U.S. at 395-96. Further, although interconnection agreements have fixed terms (generally three to five years), new entrants are free at any time to request new interconnection agreements that would address issues not covered in the first agreement or that would supercede the first agreement. In addition, the Act allows the incumbent Bell Operating Companies (who serve 80% of the nation)—through "statement[s] of generally available terms and conditions" ("SGATs")—to provide services and facilities without regard to the existence or terms of any interconnection agreement. § 252(f).

Third, "interconnection agreements" (and the foregoing SGATs) are merely documents that define an incumbent LEC's obligations with greater degrees of specificity than does the statute or the FCC's then existing regulations. The

approved section 252 agreements thus typically address scores of individual issues and are lengthy. But because of the complexity of modern telephone networks and of the new intercarrier arrangements that the Act requires, it is impractical and perhaps impossible for even the most carefully negotiated and arbitrated agreement to resolve all of the details of network sharing arrangements and to prescribe precisely what the incumbent must do to effectuate the requirements of the Act and the FCC's regulations. In the course of the implementation of any interconnection agreement (or SGAT), it is inevitable that real or imagined ambiguities in the agreement will be identified, and that questions will arise whether particular proposed interpretations of the agreement do or do not meet the requirements of the Act and the FCC's evolving regulations (and do or do not otherwise comport with the parties' intent).

In recognition of these realities, the Act provides detailed federal remedies to deal with issues that arise after interconnection agreements are approved and during their implementation. In addition to the remedies before the state commission that are directly at issue in this case, section 251 of the Act requires that LECs provide interconnection (under § 251(c)(2)) and access to unbundled network elements (under § 251(c)(3)) in accord both with the terms of the applicable interconnection agreements that have been approved under § 252 and with the substantive requirements of § 251. When LECs are claimed to have violated these (or other) requirements of the Communications Act, injured persons have a federal private right of action against the LEC which can be pursued either at the FCC or in federal district court. See §§ 206-209. Under this federal remedy, the agreements will be interpreted in light of the substantive requirements of the Act, and LEC conduct will be enjoined if it is found to violate the interconnection agreement (as thus construed).

Further, in the case of Bell Operating Companies ("BOC") who seek long distance authority, the Act provides for elaborate state and federal proceedings to determine not just whether the BOC is providing interconnections and access in accord with the provisions of previously approved interconnection agreements, but also whether the BOC has in fact "fully implemented" interconnection agreements or other arrangements under which it is providing interconnections, access to unbundled network elements, and wholesale services for resale in accord with the requirements of §§ 251(c)(2), 251(c)(3), and 251(c)(4). §§ 271(c)(2)(B)(i), (ii), & (iv), (d). The determination of the adequacy of these incumbent LECs' efforts to implement the Act have led state commissions and the FCC to make determinations and records that are thousands of pages long and have generated FCC and state decisions that are hundreds of pages long.[2]

2. Since the 1996 Act was enacted on February 8, 1996, the FCC and the various state commissions have been engaged in virtually continuous proceedings to define the obligations of incumbent LECs to share their complex and evolving network facilities.

The FCC issued its initial regulations on August 8, 1996. But since that date, the FCC has instituted numerous further rulemaking and reconsideration proceedings in which it has modified, clarified, or interpreted these regulations, and many of these proceedings are still pending.[3] In addition, incum-

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[2] *See, e.g.*, *Application of Bell Atlantic N.Y.*, 15 FCC Rcd. 3,953 (1999), *aff'd*, 220 F.3d 607 (D.C. Cir. 2000); *Joint Application by SBC Communications Inc.*, CC No. 00-217, 2001 WL 55637 (F.C.C. Jan. 22, 2001); *Application of Verizon New England Inc.*, 16 FCC Rcd. 8,988 (2001).

[3] *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd. 14,171 (1996); *Local Competition Order*, Order on Reconsideration, 11 FCC Rcd. 13,042 (1996); Second Order on Reconsideration, 11 FCC Rcd. 19,738 (1996); Third Order on Reconsideration and Further Notice of

bent LECs have challenged the lawfulness of the FCC's rules in judicial review proceedings, and while most of the FCC's rules have been upheld, some were vacated and remanded to the FCC for further consideration;[4] some were reversed in their entirety by appellate courts;[5] and still others were vacated by an appellate court and later reinstated by this Court.[6] Similarly, state commissions have been continually engaged in their own efforts to define the LECs' obligations under the interconnection agreements that translate the requirements of the Act and the FCC's regulations into more concrete duties, often modifying existing obligations in interconnection agreements. See *infra* at 17-20.

3. The Act provides for federal agency and judicial intervention to ensure that state commission action or inaction under section 252 cannot thwart the Act's implementation. Section 252(e)(4) of the Act provides that no state court can review the actions of a state commission in "approving or rejecting" an interconnection agreement. Section 252(e) also provides that, if a state commission opts not to act in any proceeding or other matter under this section, "then the [FCC will] preempt[] the State's ... jurisdiction" and "assume the responsibility of the State commission" and "act" for the state

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Proposed Rulemaking, 12 FCC Rcd. 12,460 (1997); Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3,696 (1999).

[4] *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1, 7-9 (D.C. Cir. 2000); *GTE Serv. Corp.* v. *FCC*, 205 F.3d 416, 427 (D.C. Cir. 2000); *WorldCom, Inc.* v. *FCC*, 246 F.3d 690, 696 (D.C. Cir. 2001).

[5] *Iowa Utils. Bd.* v. *FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (vacating FCC's "superior quality" rules), *cert. granted in part*, 121 S. Ct. 877, 878, 879 (2001) (Nos. 00-511, 00-555, 00-587, 00-590, 00-602).

[6] *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (vacating FCC's combination of network elements rule), *aff'd in part, rev'd in part sub nom. AT&T Corp.*, 525 U.S. at 395 (reinstating rule).

commission "with respect to the proceeding or matter."[7] § 252(e)(5). When the FCC acts to resolve the issues, its orders are reviewable in federal courts of appeals. § 252(e)(6), 402. Similarly, § 252(e)(6) provides that "[i]n any case in which a State commission makes a determination under this section," an "aggrieved" party "may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this [section 252]." §§ 252(e)(6).

The FCC has held that disputes involving the proper interpretation or enforcement of previously approved interconnection agreements are proceedings or matters "within the states' 'responsibility' under section 252." *Starpower Communications*, 15 FCC Rcd. 11,277, 11279-80 ¶ 6 (2000). Thus, where a state commission has refused to act on such "matters," the FCC has entered orders preempting the state and has assumed jurisdiction to interpret and enforce the terms of the previously approved agreement. *Id.* Similarly, where state commissions exercise their responsibility to interpret and enforce these agreements, federal courts have almost uniformly concluded that the state commission has made "a determination" under section 252 and that its decision is reviewable under section 252(e)(6).

4. This case arises from a ruling by the Illinois Commerce Commission ("ICC") requiring Ameritech to pay, in accordance with the Act and its interconnection agreements, "reciprocal compensation" for calls by its customers to Internet Service Providers ("ISPs") that are customers of new

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[7] The state suffers no penalties or adverse consequence when it elects not to exercise responsibilities under § 252. In that event, § 252(e)(6) provides that "judicial review of the [FCC]'s action shall be the exclusive remedy for the state's failure to act." § 252(e)(6). Further, regardless of whether a state accepts or declines Congress' invitation to participate in implementing the new federal scheme, the Act expressly preserves existing state regulation of local telephone service, so long as it does not conflict with federal law. *See* §§ 251(d)(3), 252(e)(3), 261(b).

entrants.[8] See §§ 251(b)(5), 252(d)(2). To fulfill this and other duties under the Act, in 1996 and 1997, the Competing Carrier Respondents and Ameritech had entered into interconnection agreements that incorporated the requirements of the FCC's then-existing reciprocal compensation regulation. *E.g.*, JA 20a, 25a.[9] The agreements expressly provide that they are intended to set forth "the terms and conditions under which the Parties will interconnect their networks and provide other services *as required by the Act*," *e.g.*, *id.* at 19a, 24a (emphasis added).

The parties submitted these agreements to the ICC, and the ICC elected to exercise jurisdiction. After arbitrating other open issues, it approved the agreements. These agreements provide that the ICC retains jurisdiction to resolve disputes about the interpretation and implementation of the agreements and provide for modifications of the agreements in the event of material changes in the FCC's regulations and other provisions of the law.[10] Since the agreement has been approved, the ICC has often exercised this retained jurisdiction.[11]

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[8] The new entrants all are respondents here: AT&T Communications of Illinois ("AT&T"), Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom"), MCI Telecommunications Corporation and MCImetro Access Transmission Services LLC (collectively, "MCI"), and Focal Communications Corporation ("Focal") (collectively, the "Competing Carrier Respondents ").

[9] The respective parties generally reached mutually agreeable reciprocal compensation terms through negotiation; in TCG's case, the parties settled the provision during the course of an arbitration.

[10] *See, e.g.*, JA 29a-30a; Addenda 3-4.

[11] For example, shortly after certiorari was granted in this case, the ICC approved a negotiated amendment to that agreement "pursuant to Section 252(e) of the Telecommunications Act of 1996." *Illinois Bell Tel. Co. (Ameritech Ill.) and TCG Ill. and TCG Chicago Joint Pet. for Approval of an Interconnection Agreement*, Order § V(3) (ICC Apr. 11, 2001).

In the fall of 1997, the Competing Carrier Respondents filed complaints with the ICC, alleging that Ameritech had stopped paying reciprocal compensation for calls to ISPs in violation of the agreements. See JA 52a, 77a, 90a, & JA 98a. The ICC invoked its jurisdiction under state law and "Section 252 of the Telecommunications Act of 1996 ... to interpret and enforce the terms of interconnections agreements." JA 112a, 121a. Following a full evidentiary hearing, the ICC ruled that by discontinuing reciprocal compensation payments for ISP-bound traffic, Ameritech "violated, and is continuing to violate, its interconnection agreements, and its duty under the Act." JA 114a-116a.

Ameritech sought review of the ICC order in federal district court, invoking jurisdiction pursuant to § 252(e)(6) and 28 U.S.C. § 1331, and asserting that the ICC's reciprocal compensation determination violated federal law. Ameritech named not the ICC, but the individual commissioners in their official capacities, see JA 125a, 130a, seeking prospective injunctive and declaratory relief against ongoing violations of federal law, see *id.* at 145a. The district court denied the commissioners' motion to dismiss the action on both statutory and sovereign immunity grounds, see Pet. App. 27a-30a, and upheld the ICC order on the merits. See JA 173a-180a.

The ICC commissioners appealed the jurisdictional ruling to the United States Court of Appeals for the Seventh Circuit. The court held that the ICC is "charged" in the Act to "determin[e] what the parties intended under the agreement" in accord with the requirements of federal law and to issue decisions "implementing the agreements." Pet App. 13a. It thus agreed that § 252(e)(6) jurisdiction is not limited to the review of interconnection agreements, and that the statute read as a whole shows "Congress envisioned suits reviewing 'actions' by state commissions" that thus implement the 1996 Act. *Id.* at 13a-14a.; *Illinois Bell Tel. Co.* v. *WorldCom Techs., Inc.*, 157 F.3d 500, 501-02 (7th Cir. 1998).

Next, the court rejected the commissioners' assertions of sovereign immunity, based largely on its prior decision in *MCI Telecommunications Corp* v. *Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999) ("*MCI I*"), *modified on reh'g*, 222 F.3d 323 (7th Cir. 2000) ("*MCI II*"), *cert. denied*, 121 S. Ct. 896 (2001). The court held, as in *MCI II*, that "the participation of the Commission in the scheme set out in the Act is a waiver of the state's sovereign immunity." Pet. App. 13a. The *MCI II* court also had held that suits such as these are "'straightforward' *Ex parte Young* cases." *MCI II*, 222 F.3d at 345. Finally, the court "affirm[ed] the decision of the district court affirming the order of the Illinois Commerce Commission," Pet. App. 22a, holding that "[t]he ICC's conclusion ... does not violate the Act or the FCC's interpretation of the Act," *id.* at 20a.

SUMMARY OF ARGUMENT

The Seventh Circuit correctly held that § 252(e)(6) gives federal courts jurisdiction over state commission orders that interpret previously approved interconnection agreements and that the exercise of this jurisdiction does not violate the Eleventh Amendment. There is no substance to any of the claims raised by petitioners.

1. First, petitioners nave here raised an extreme and untenable statutory claim that rests on artificial distinctions that have no support in the statutory text and that is inconsistent with the structure of the statutory scheme as a whole. In particular, petitioners contend that § 252(e)(6) of the Act provides for federal court review of state determinations of the LECs' obligations to provide interconnections to new entrants only when the determinations are made in connection with the initial "formation" and "approval" of an interconnection agreement. Petitioners claim that federal court review is not available under § 252(e)(6) over "subsequent commission action" in which the state commission enters orders that interpret, modify, or supercede the provisions of the interconnection

agreement after it was initially approved – and makes the *same* determinations under federal law that the commission could have made when it initially approved the agreement.

Petitioners' claims have no support in the text of § 252(e)(6). That provision authorizes actions in an appropriate federal district court "in any case" in which a state commission makes "determinations under this section [252]" and provides that the federal court is to determine whether the resulting interconnection agreement or statement meets the requirements of §§ 251 and 252 and of the FCC's implementing regulations. Under the terms of § 252, it makes no difference to federal court jurisdiction whether the state has made its "determinations" in the "proceeding" in which it initially approved the agreement or in connection with a subsequent proceeding or "matter" in which the state resolved open issues or otherwise interpreted or modified the agreement. In both events, the state commission action will squarely present the question whether the resulting agreement meets the requirements of federal law.

Petitioners' claims are also antithetical to the statutory scheme as a whole. Petitioners' basic contention is that the "goals" of the Act are met by the initial approval of an interconnection agreement that is upheld by a federal court and that Congress intended thereafter to rely exclusively on state court proceedings to assure that the Act is implemented. That is simply wrong. Congress recognized that the initial approval of interconnection agreements that are susceptible of implementation in ways that meet the Act's requirements is only a first step. The Act thus contains a whole panoply of federal remedies to assure that incumbent LECs do not subvert their agreements after they are approved and that the incumbent LECs in fact implement the agreements in a manner that satisfies the terms and purposes of the Act. Petitioners' proposed construction of § 252(e)(6) could create conflicts with the Act's other remedies.

2. Even if this suit had been a suit against the ICC, it waived any Eleventh Amendment claim. It has long been the rule that a state may waive its sovereign immunity by participating in a federal program that clearly conditions state participation on consent to federal jurisdiction. The state commissions had no independent right to implement the new federal regulatory scheme of section 252 without congressional authorization, for Congress could have delegated the administration of that scheme exclusively to the FCC. Instead, it granted state commissions the opportunity to participate, subject to their right to opt out of the scheme and the clear condition that parties aggrieved by determinations that they make under § 252 could seek judicial review in federal court. The ICC (which specifically declared that it was exercising section 252 jurisdiction) accepted the conditions imposed by section 252 in exercising its rights thereunder, and thus consented to federal court jurisdiction under section 252(e)(6).

3. The ICC commissioners are also subject to federal court jurisdiction under *Ex parte Young*. Petitioners contend that *Ex parte Young* jurisdiction cannot be based on a "'claim of error in the exercise'" (Br. 43-44) of statutory jurisdiction under *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949). But the passage in *Larson* relied upon by petitioners discussed issues involving ultra vires acts of federal officers and individual-capacity liability that have no applicability to official-capacity suits under *Ex parte Young*. *Ex parte Young* authorizes federal court jurisdiction whenever acts of a state officer in his official capacity violate a federal statute and thus the Supremacy Clause, and the doctrine is always available if the plaintiff seeks prospective relief to vindicate federal statutory rights. Moreover, unlike the statute at issue in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Act does not prescribe a detailed remedial scheme inconsistent with *Ex parte Young* jurisdiction.

ARGUMENT

I. STATE COMMISSION ORDERS THAT INTERPRET, MODIFY, OR ENFORCE INTERCONNECTION AGREEMENTS ARE REVIEWABLE UNDER SECTION 252(e)(6).

Like other courts of appeals, the Seventh Circuit held that state commissions orders that interpret, modify, or enforce previously approved interconnection agreements are subject to judicial review in federal district court under section 252(e)(6). Petitioners contend that this holding is contrary to the plain language of section 252(e)(6) which, they claim, provides for federal court review only of decisions that initially approve agreements. They further contend that the doctrine of constitutional avoidance would compel this Court to reverse even if the matter were doubtful.

Each of the petitioners' arguments lacks merit. "[T]he meaning of statutory language, plain or not, depends on context," *King* v. *St. Vincents Hosp.*, 502 U.S. 215, 221 (1991), and thus courts must "'look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). But petitioners are urging artificial distinctions that have no support in the text of § 252(e)(6) itself. Further, their proposed distinctions are inconsistent with the statutory scheme as a whole, would create conflicts with the Act's other federal remedies, and would serve no rational purpose.

A. Section 252(e)(6) Provides For Federal Court Review Of All State Determinations Of The Lawfulness Of The Requirements That They Prescribe, Irrespective Of When They Are Made.

The interconnection agreements authorized in section 252 are a principal mechanism for implementing the new federal duties that Congress imposed on incumbent LECs to create competition in local telephone markets. See *AT&T Corp.* v.

Iowa Utils. Bd., 525 U.S. 366, 371-73 (1999). In section 252, Congress granted willing state commissions the authority to establish the requirements of interconnection agreements, subject to federal district court review that would assure that the resulting obligations meet the requirements of sections 251 and 252 of the Act and the FCC's implementing regulations.

In the discharge of these obligations to date, state commissions have not attempted definitively to resolve all of the issues that may arise between the parties in advance of the initial approval of the agreements. To the contrary, they have approved agreements that they believed would be susceptible of being implemented in a manner that would satisfy the standards of the Act, and by approving an agreement within the statutory ten month period, they advanced the statutory purpose of allowing the rapid implementation of network sharing arrangements that will allow competition to develop. At the same time, for practical reasons, the state commissions deferred the resolution of certain open issues and more detailed statements of the incumbent LECs' responsibilities to future proceedings that the state commissions retained jurisdiction to conduct. For example, at the time of the initial approvals of agreements, state commissions had almost uniformly made no attempt to establish permanent rates for interconnections and network elements that meet the standards of § 252(d) of the Act. Instead, they have approved agreements that contain "interim rates," but that provide that permanent rates would be set in future arbitration or industry-wide proceedings under the Act's standards and that those rates would supercede those set forth in the previously approved agreement. See, *e.g.*, *US West Communications* v. *MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999).

Similarly, the agreements did not specify the LECs' obligations with respect to every conceivable type of facility or service arrangement that can be claimed to fall within the duties covered by the agreements. Nor did they generally

prescribe all of the specific performance standards that must be met to satisfy the agreements' and the Act's general requirements. Instead, they provide a mechanism for resolving these questions in the future by providing that when there are specific disputes about the interpretation of the agreements and their application to specific arrangements, those disputes may be brought to the state commissions. *See, e.g.*, JA 28a; Addenda 1-2. In this regard, the parties recognized that fundamental questions involving the obligations of incumbent LECs can be resolved by orders that interpret previously approved agreements. Indeed, orders that nominally interpret agreements can constitute modifications of the agreements.[12]

In addition, the parties have recognized that interconnection agreements (like injunctions and consent decrees) are entered into in response to particular federal statutes and implementing regulations, and that the interconnection agreements must be subject to modification if particular FCC regulations are vacated or revised or if the legal and factual circumstances in existence at the time of their adoption have otherwise fundamentally changed. Compare *System Fed'n No. 91, Ry. Employees Dep't* v. *Wright*, 364 U.S. 642, 646-47 (1961). In establishing the initial agreements, the parties and the state commission have not attempted to adopt provisions that identify all possible future changes in the law and industry conditions and that prescribe how the incumbent LECs' obligations will be altered if any occur. Instead, the agreement provide procedures in which modifications of the agreements can be sought if FCC regulations are invalidated or revised or if other material changes in the law occur. See, *e.g.*, JA 29a-30a; Addenda 3-4.

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[12] *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.9 (1975) (discussing "modification in the guise of constru[ction]"); *Wilder* v. *Bernstein*, 49 F.3d 69, 72 (2d Cir. 1995) (erroneous constructions of decrees constitute modifications); *United States* v. *City of Chicago*, 978 F.2d 325, 333 (7th Cir. 1992) (interpretations are often modifications).

In short, the state orders that have approved interconnection agreements have almost uniformly been subject to the outcome of future proceedings. When state commissions conduct these post-approval proceedings, they must make determinations concerning the lawfulness of the agreement as modified or construed under federal law. In each instance, these are the same legal determinations that the state commission would have made at the time of the initial approval of the agreement if the parties and the state had attempted to foresee all the future issues that would arise and sought to have them resolved in advance.

For example, when final prices are set in post-approval proceedings, the state must determine if the rates meet the standards of §§ 251(c) and 252(d) and the pertinent FCC regulations. §§ 252(d)(2)-(4). When arbitrated agreements are being interpreted or modified, the state will determine if the interpretation of the agreement or the new modified terms satisfy the substantive requirements of §§ 251 and 252 and the FCC regulations. § 252(e)(2)(B).

Matters are no different when a state commission resolves a dispute over the proper interpretation of a term of an interconnection agreement that was not arbitrated but that was "negotiated": that is, agreed to the parties in light of the requirements of the FCC's then-existing regulations. When negotiated agreements are interpreted, the state must determine—at a minimum—if the result is an agreement that satisfies the substantive requirements of federal law that govern negotiated agreements: that is, that the term is non-discriminatory and will be implemented consistently with the public interest. § 252(e)(2)(A). Further, because the FCC regulations establish requirements that are to appear in every interconnection agreement unless there is "clear mutual assent to different terms," *Local Competition Order* ¶ 56, the resolution of disputes about the interpretation of "negotiated" terms will ordinarily turn on a state commission's determinations of how the FCC's then-existing regulations

apply to the particular facility, service, or other condition. That, too, is the same determination that the state commission would have made if the parties had foreseen the dispute before the agreement was finalized and had decided to arbitrate the question of what the incumbent LEC's obligation would be under those particular conditions.

Petitioners concede that when a state commission makes any of the foregoing determinations prior to approval of an interconnection agreement or statement, the determinations are reviewable in federal district court under § 252(e)(6) and that the Act then prohibits state court review. See § 252(e)(4). The federal court and the federal court alone is then to "determine whether the agreement or statement meets the requirements of section 251 and this section [252]." § 252(e)(6).

But petitioners contend that § 252(e)(6) bars federal court review of these same determinations—and requires that they be reviewed only in state court—when the state enters an order modifying, interpreting, or enforcing the agreement after it was initially approved. In petitioners' view, the plain terms of § 252(e)(6) deny federal courts jurisdiction over any such "subsequent commission action[s]." Br. 13. They thus could not review the state orders that apply the standards of § 252(d) and the FCC's pricing regulations to set permanent network element rates that supercede the interim rates contained in the agreement when it was approved. They similarly could not review whether interpretations of broad terms of the agreements violate federal law. Indeed, under petitioners' position, there could be no federal court review even if a federal court had previously upheld the agreement on the ground that it is required by federal law, and the state commission had the next day vacated the agreement based on a purported change in federal law.

While this position is contrary to the Act as a whole, the short answer to petitioners' claim is that the terms of

§ 252(e)(6) do not permit the distinction that petitioners propose, much less require it. That is so for three reasons.

First, § 252(e)(6)'s terms expressly apply to all determinations made under the section, regardless of whether they occur before or after the initial approval of the agreement. In particular, section 252(e)(6) is entitled "Review of State commission actions," and it broadly provides that "[i]n *any* case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement ... meets the requirements of section 251 of this title and this section." § 252(e)(6) (emphasis added). These terms do not permit a claim that a determination of the LECs' responsibilities and their lawfulness is reviewable in federal court when made prior to approval, but not when the same determinations are made thereafter to the agreement as interpreted or modified.

Second, petitioners' claim would be baseless even if these terms applied only to determinations that are made in the "proceedings" in which interconnection agreement are approved. When parties and the state commission defer open issues and questions of the interpretation and modification of the agreements, the future proceedings that result are fundamentally a continuation of the proceedings in which the agreement or statement was approved. They occur because the parties and the commission determined that it was impractical to resolve all possible issues at initial approval, which is statutorily required to occur within ten months of the request for interconnection. Instead, the parties and the commission deferred the issues, and made the approval of the agreement subject to the outcome of the future proceedings.

Petitioners do not argue that the state commissions lack the authority to defer these determinations under § 252 to future proceedings with the assent of the parties to the interconnection agreement. In administering federal statutes, agencies inherently have the authority that is "a 'legitimate,

reasonable, and direct adjunct to ... explicit statutory power.'" *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 655 (1978). Thus, the determinations made in post-approval modification, interpretation, or enforcement proceedings are part of the same "proceeding" in which the agreement was "approved."

For the same reasons, every court of appeals to resolve the issue has held that "[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission."[13]

Third, § 252(e)(5) establishes that state commissions have responsibilities under § 252 not only in the "proceedings" in which interconnection agreements are formed and initially approved, but also in "other matter[s] under this section." In particular, it provides a mechanism in which a state commission may elect whether or not to discharge its responsibility in "any proceeding *or other matter* under this section [252]" and in which the FCC will assume jurisdiction if the state elects not to act. Whether or not it is a "proceeding" under § 252, it is assuredly a "matter" under the section when a state resolves open issues or interprets, modifies, and enforces an agreement after it had initially been approved.

In this regard, if there were any doubt about the scope of section 252(e), it is resolved by the FCC's authoritative

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[13] *MCI II*, 222 F.3d 323, 338 (7th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("the state commission's power to enforce a federally-mandated interconnection agreement arises from § 252"); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479–80 (5th Cir. 2000) ("the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved").

construction in *Starpower Communications*, 15 FCC Rcd. 11,277 (2000). There, as here, a carrier petitioned a state commission to enter an order construing an interconnection agreement to require the payment of reciprocal compensation for traffic to internet service providers. The state commission declined jurisdiction. See *id.* at 11278 ¶¶ 3-4. The carrier then petitioned the FCC to preempt the state commission's jurisdiction pursuant to § 252(e)(5) and to decide the controversy itself. The FCC granted the petition. It held that that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252." *Id.* at 11,278 ¶ 6. Under the FCC's decision, these disputes are resolved in a "proceeding" or a "matter" within the meaning of § 252(e)(5), and the resulting decision is a "determination under" § 252 that is reviewable in a federal court of appeal when made by the FCC and that is reviewable in federal district court when the state commission elects to do so. § 252(e)(6).

This FCC interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). See *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2172-75 (2001). Section 252 plainly does not expressly prohibit state commissions from interpreting, modifying, or enforcing the interconnection agreements they approve, and the FCC's conclusion that that section grants the authority to the state commissions to conduct these proceedings and to make determinations under § 252 in them is reasonable. See *Brooks Fiber Communications*, 235 F.3d at 497; *Connect Communications Corp.*, 225 F.3d at 947 ("we can reach no conclusion but to agree with the FCC's determination that the state commissions' power to enforce interconnection agreements springs from § 252").

In urging its contrary position, petitioners make a series of claims. First, they rely, Br. 17-18, on this Court's decision in

Ardestani v. *INS*, 502 U.S. 129, 135 (1991). But it interpreted a statute that authorized awards of attorney fees to prevailing private parties in any federal agency proceedings that had been conducted "under" section 554 of the Administrative Procedure Act. The Court held that, in context, this statutory provision could apply only to agency proceedings that were conducted under statutes or regulations that expressly subjected the agency to the procedural requirements imposed by this provision of the APA. Here, by contrast, Ameritech sought review of the ICC's enforcement determinations "under" section 252, and the ICC had stated, correctly, that its determinations were made "under" section 252. JA 112a, 121a.

Second, the petitioners claims that a district court's exercise of jurisdiction over a state commission's enforcement orders cannot be reconciled with section 252(e)(6)'s authorization of review "'to determine whether the agreement ... meets the requirements of section 251 and [section 252].'" Br. 19 (footnote omitted). According to the petitioners, such a determination "should occur at the time the agreement is approved." *Id.* But that is not so. No less than at the approval stage, the district court exercising enforcement review may determine whether the interconnection agreement, *as interpreted or modified*, meets the Act's requirements. As explained above, when a state commission enters orders that interpret previously approved agreements, that adopt permanent rates that supercede the interim rates in the agreement, or that otherwise modify its provisions, it can raise questions under federal law that had not been previously addressed by the state commission and that could not have been decided by a federal district court in review of the decision approving the agreement.

That is starkly the case with state commission orders that adopt permanent rates under the standards of § 252(d) and the FCC's regulations or that otherwise modify agreements. It is equally true of decisions interpreting arbitrated agreements,

which must comply with the requirements of sections 251 and 252 of the Act. *See* § 252(e)(2)(B). On review of a decision interpreting an agreement, the district court would make the straightforward determination of whether the interpretation of the LECs' duties "meets the requirements of section 251 ... and this section [252]." § 252(e)(6).

The district court conducts a similar analysis for negotiated provisions of an interconnection agreement. If a district court determines that the parties intended the contested provision of the interconnection agreement to implement a duty prescribed under section 251 or 252 of the Act or to incorporate the requirements of particular FCC regulations, it would likewise determine whether the interpretation meets the substantive standards of those sections. If, on the other hand, the district court determines that the parties negotiated a departure from the Act's substantive requirements, it would uphold the agreement as "meet[ing] the requirements" of section 252, which specifically authorizes such departures. See *id.* § 252(a)(1), (e)(6). In either event, the district court would have to determine if the agreement as interpreted satisfied the non-discrimination and public interest standard applicable to negotiated agreements. § 252(e)(2)(A).

Furthermore, as the courts of appeals have held, a district court is not limited under section 252(e)(6) to determining whether the agreement complies with the Act, and may review subsidiary determinations of the state commission under an arbitrary-and-capricious standard. See, *e.g.*, *Brooks Fiber Communications*, 235 F.3d at 498-99; *US WEST Communications*. v. *MFS Intelenet, Inc.*, 193 F.3d 1112, 1117, 1124 n.15 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000); *GTE S., Inc.* v. *Morrison*, 199 F.3d 733, 745 (4th Cir. 1999). Those courts have recognized, for example, that the lawfulness of network-element rates in an interconnection agreement cannot be decided unless the district court determines whether the state commission acted arbitrarily in excluding or including certain costs in the ratemaking

proceeding. Cf. § 252(d)(1)(A)(i) (network element rates must be cost-based). Thus, the district court's power and duty to determine the lawfulness of interconnection agreements do not preclude it from interpreting the agreement or reviewing other state commission determinations.

Finally, petitioners claim that the terms of § 252(e)(6) must be construed narrowly because it "grants" federal district courts jurisdiction that would not otherwise exist. But this claim is doubly wrong. Congress enacted § 252(e)(6) against the background of the settled rule that local and state commission orders that authorize conduct that violates federal statutes can be challenged in either federal district court (under 42 U.S.C. § 1983 and 28 U.S.C. § 1331) or in state court. See *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 358-59 (1989). Section 252(e)(6) thus merely creates a separate statutory basis for challenges that could otherwise have been brought in federal court under other provisions of the law. In addition, while this case does not raise the question whether the federal court jurisdiction is exclusive, § 252(e)(4) makes federal court jurisdiction exclusive over at least some and arguably all of these claims that are cognizable under § 252(e)(6).[14]

In all events, even genuine "grants" of jurisdiction are to be construed not narrowly, but in "strict fidelity to their terms." *Stone* v. *INS*, 511 U.S. 386, 405 (1995). That principle requires upholding the Seventh Circuit's decision, for

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[14] Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." § 252(e)(4). If state commission orders resolving issues deferred to future proceedings are deemed to be continuations of approval proceedings (see *supra* 19-25), federal district courts have exclusive jurisdiction over these orders. But even if there is not exclusive federal court jurisdiction under § 252(e)(4), these orders make "determinations" under § 252 and satisfy the different terms of § 252(e)(6), such that they are reviewable in federal court at the aggrieved party's option.

§ 252(e)(6) broadly authorizes judicial review "[i]n *any* case in which a State commission makes a determination under this section," not merely those approving agreements.

B. Petitioners' Construction Is Inconsistent With The Act's Other Remedies And Its Objects.

In addition to violating the terms of § 252(e)(6), petitioners' claims are foreclosed by the Act as a whole and its objects and policies. This point is confirmed by petitioners' attempts to argue otherwise. In particular, petitioners acknowledge that the object of the Act is to foster local competition by implementing arrangements in which incumbent LECs share essential and other related facilities with competitive carriers on terms that are nondiscriminatory and just and reasonable. But petitioners contend that that goal is accomplished by the mere initial formation and approval of interconnection agreements that do not violate federal law on their face. Once that occurs, petitioners contend that there is no longer a substantial federal interest in regulating the LECs' conduct and that it is subject only to state commission orders reviewable in state courts under state contract law.

These claims are flatly contrary to the provisions of the Act as a whole, which dramatically underscore why § 252(e)(6) cannot be construed to apply only to determinations that are made under § 252 at the time of the initial approval of interconnection agreements. First, because Congress recognized that "post-approval conduct" and orders can wholly defeat the Act's objects, the Act contains federal substantive requirements and a panoply of federal remedies that are fully applicable after interconnection agreements have been initially approved. Second, under the Act's terms and settled law, interconnection agreements are matters governed by federal law, not state contract law.

1. Petitioners' Claim Is Inconsistent With The Act's Substantive Provisions And Other Remedies.

The Act's overall terms, structure, history, and stated objects foreclose any claim that Congress could have intended to rely on federal district courts and on federal law merely to assure the initial formation and approval of interconnection agreements that do not violate the Act's requirements on their face and to leave all subsequent regulations of the LECs' responsibilities to state commission actions that are initially reviewable only in state courts.

First, while this case involves a post-approval interpretation of a previously-approved agreement, petitioners' position would bar federal court review of any state commission order entered subsequent to the approval of an interconnection agreement that is found to meet federal law, including decisions that adopt permanent superceding rates or that vacate or modify agreements that had been previously approved. That would allow the absurdity, for example, that a federal court might order changes in an agreement to satisfy federal law but that state commission order would be able, following approval of the required agreement, to vacate it based on a purported change in law, and that decision could not be reviewed by the federal court.

Second, disputes over "interpretations" of provisions themselves present fundamental issues. As courts have repeatedly held, decisions that purport merely to "interpret" consent decrees or contracts can effect fundamental modifications of the provisions. See *supra* n.12. There are myriad situations under the Act when a term of an interconnection agreement is claimed to be susceptible both to an interpretation that would meet the Act's requirements and a second interpretation that would fundamentally violate them. There is the same federal interest in reviewing the post-approval "interpretations" of the provisions as there is

the initial formulation of terms that appear susceptible of implementation that is consistent with the Act.

The overriding fact is that the "approval" of a LEC's interconnection agreement with an individual carrier is merely an intermediate step in the process of translating the requirements of the Act and the FCC's regulations into concrete rights to appropriate commercial arrangements. As the terms of the Act recognize, following the approval of the interconnection agreement, there is a lengthy period of "implementation" in which the competing carrier places orders under that agreement (or an SGAT or a different party's agreement) and in which the LEC will actually provide facilities under rates, terms, and conditions that do or do not satisfy the substantive requirements of §§ 251 and 252. See § 252(c)(3) (implementation schedule), § 271(c)(1)(B) (state determinations of violations of agreement's implementation schedule) & § 271(c)(1)(A), (c)(2)(B)(i)-(iv), & (d)(3)(A) (discussing requirements of "full implementation" of requirements of § 251(c) and § 252(d) that are incorporated into interconnection agreements).

None of the foregoing sections make sense unless § 252 is construed to grant state commissions the authority to ensure that interconnection agreements are implemented in ways that satisfy the duties prescribed under the Act and FCC regulations. The reality is that states cannot practicably discharge that responsibility unless they defer specifications of the LECs' precise duties and can enforce the agreements after they are initially approved. Even if § 252's terms were otherwise ambiguous, a court's interpretation of an agency's power "does not stop with a section-by-section search" for precise terms in the organic statute, and these factors would compel interpreting § 252 to cover these implementation proceedings. *American Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 309-10 (1953). Similarly, to preclude federal district court review of the state interpretation of the agreements that occur during implementation proceedings

would plainly subvert the federal interests in having these disputes resolved as efficiently and effectively as possible.

Third, petitioners' claims are refuted by the Act's other remedies. For example, in addition to the other duties it imposes on the incumbent LECs, the Act requires them to provide interconnections and access to unbundled network elements in accord with requirements of both their interconnection agreements and those of §§ 251 and 252. See §§ 251(c)(2) & 252(c)(3). Indeed, the Act specifically provides that all interconnection agreements are "binding" as a matter of federal law. §§ 252(a)(1) & 271(c)(1)(A).

The Act further provides explicit federal remedies for violations of the incumbent LECs' duty to abide by interconnection agreements. Section 206 of the Act creates a private right of action against a common carrier for any act "prohibited or declared to be unlawful" or any omission to do "any act ... required to be done," § 206, and this action can be brought either in federal district court, § 207, or at the FCC, § 208. Because Congress codified §§ 251-261 as an "amendment to, and hence as part of" the Communications Act, Congress expressly provided that these and all the other remedial provisions of the Act are fully applicable to § 251 and the Act's other local competition provisions unless some other provision of the Act creates an express or implied exception to the literal terms of §§ 206-209. *AT&T Corp*, 525 U.S. at 378 n.5 (emphasis in original deleted). See also S. Rep. No. 104-23, at 47 (1995) (discussing availability of Act's remedies for interconnection agreement). The FCC has specifically held that "a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated [interconnection] agreement." *Local Competition Order* ¶ 127. And while one aspect of this decision was challenged on appeal and not resolved by this Court, there is no question that the §§ 206-209 remedies will be available at least to the extent that the lawfulness of a state commission's post-approval

interpretation of an interconnection agreement cannot be litigated in federal district court under § 252(e)(6).[15]

The explicit federal duties of §§ 251(c)(2) & (3) plainly refute petitioners' claim that there is no federal interest in the interpretation or modification of interconnection agreements after they are approved, for interconnection agreements cannot be violated until after they take effect.[16] The existence of the federal rights of action under §§ 206-209 further underscores the conflicts and absurdities that could arise if

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[15] The FCC had more broadly construed its section 208 authority to allow it also to review state-commission decisions arbitrating and approving an interconnection agreement as an alternative to district court review under 47 U.S.C. § 252(e)(6). *Local Competition Order* ¶¶ 127-128. This aspect of the FCC order was challenged as inconsistent with § 252(e)(6). In *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), this Court did not resolve this challenge on the ground that the claim was not ripe for review. 525 U.S. at 386.

[16] Given that Congress has expressly provided federal administrative and judicial remedies, the ICC never explains how state commissions may *without congressional authorization* invoke independent administrative jurisdiction under state law to enforce the federal statute and the obligations created thereby. "It is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union of N. Am.* v. *National Mediation Bd.*, 320 U.S. 297, 301 (1943). Congress must implicitly have authorized a right of administrative enforcement in order for state administrative remedies to be invoked. *See* Henry P. Monaghan, *Federal Statutory Review Under Section 1983 And The APA*, 91 Colum. L. Rev. 233, 251-52 (1991); *see also, e.g.*, *Logan Ranch Karg P'ship* v. *Farm Credit Bank*, 472 N.W.2d 704, 825-26 (Neb. 1991) (no state court jurisdiction unless Congress has authorized a right of action). *Testa* v. *Katt*, 330 U.S. 386 (1947), relied on by petitioners (Br. 22-23), is not to the contrary. It stands for the proposition that state tribunals must be available to enforce rights under federal law, but it only applies if (1) the tribunal's jurisdiction under state law is broad enough to permit it to enforce the federal right, *id.* at 394, and (2) Congress authorized such enforcement, *id.* at 387, 391. The presence of other federal remedies underscores that the Act should be construed to grant state commission enforcement jurisdiction in section 252, rather than to give state commissions jurisdiction by implication under state law.

state commission orders construing or modifying interconnection agreements were reviewable only in state courts. That would create the specter that there could simultaneously be pending both (1) a federal court action against the LEC in which the agreement and the LEC's obligations to competing carriers were construed in light of the requirements of federal law and (2) a state court proceeding reviewing a state commission order that interpreted the same agreement under different standards. The potential for conflicts and needless costs would be minimized or eliminated if § 252(e)(6) were construed to apply to both pre-approval and post-approval determinations of state commissions.

Further, petitioners' claims would create other conflicts with the Act as a whole and its objects. When issues like the application of reciprocal compensation for Internet traffic arise, LECs and competing carriers will not pursue their competing claims only in the context of seeking interpretations of previously-approved agreements. The same issues will be addressed in the arbitration of new agreements (involving more recent entrants) and successor agreements. Petitioners' position would create the absurdity that a state commission's resolution of this single issue would simultaneously be reviewed in state court (in the case of the previously approved agreements) and in federal court (in the case of the newly-approved agreements) and could lead to conflicting results in proceedings involving the obligations of a single LEC in a single state.

Finally, there is no support for petitioners' sole attempt to identify other provisions of the Act that support their claims that state commission determinations of the requirements of federal interconnection agreements are reviewable in state court only when they follow the initial approval of the agreement (but not when they precede it). Petitioners rely, Br. 22, only on the provisions of § 2(b). See § 152(b). It protects state utility commission jurisdiction over intrastate services by providing that nothing in the Act shall be

"construed" to "apply" or to "give the [FCC] jurisdiction" over intrastate services. But this Court has already held that these provisions have no relevance to the duties imposed by §§ 251 and 252 in that they unambiguously apply to "local competition" and remove "a significant area from the States' exclusive control" under state law. *Iowa Utils. Bd.*, 525 U.S. at 382 n.8. Moreover, § 2(b) merely adopts a rule against construing provisions of the Act to give the FCC jurisdiction; it has no applicability to the question whether state commission determinations under § 252 are to be reviewed in federal court (under § 252(e)(6)) or only in state court. But even if § 2(b)'s rule of construction were here applicable, the statutory terms unambiguously establish that federal courts have jurisdiction over all state determinations under § 252, not merely those that precede initial approval of an agreement.

2. Interconnection Agreements Are Compulsory Federal Contracts That Derive Their Legal Force From Sections 251 and 252 Of The Act.

Petitioners are also wrong in arguing that the instant case – and other cases that will arise – are nothing more than a "state contracts case." Br. 25. There is no basis for conceiving of interconnection agreements as ordinary, voluntary contracts under state law. The latter derive their force from the will of the parties, and are (in general) no more than promises to pay damages upon breach. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 919-20 (1996) (Scalia, J., concurring in the judgment). Interconnection agreements, by contrast, are mandated by a federal statute to implement federally prescribed duties and may be imposed upon the incumbent against its will. *Local Competition Order* ¶ 134 ("the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation"); see *supra* at 4-6. Federal law dictates the subject matter that will be embodied in the agreement, requiring implementation of the

federal duties that the Act imposes upon the incumbent in sections 251(b) and (c) to open local markets to competition. See § 251(c)(1).

It is simply beside the point that the incumbent and the requesting carrier may adopt "negotiated" agreements that will be approved without regard to the standards imposed upon incumbents in sections 251(b) and (c). § 252(a)(1). Even then it is by force of the Act that the negotiated interconnection agreement is "binding," once approved as the Act prescribes. *Id.* More fundamentally, the Act provides for regulatory intervention to impose agreement terms that satisfy federal law requirements on those parties that cannot reach consensus, and it is the threat of arbitrated outcomes that gives incumbents whatever incentive they have to agree to contract terms. *Id.* § 252(e).

In short, "the rights and duties contained in those contracts [are] federal in nature," *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 23 (1982). Interconnection agreements are creations of federal law for the same reason federal labor contracts are. Each is:

> bound to the statute and its policy. If any provision contained in a § [252] contract is enforceable, it is because of congressional sanction: The federal statute is the source of the power and authority. The enactment of the federal statute is the governmental action though it takes a private agreement to invoke the federal sanction. [Such an] agreement ... has, therefore, the imprimatur of the federal law upon it ... [and] is a federal contract ... governed and enforceable by federal law, in the federal courts.

International Ass'n of Machinists v. *Central Airlines, Inc.*, 392 U.S. 682, 692 (1963) (original omissions, alterations, quotation marks, and citation omitted).

Each interconnection agreement operates as a "contract tariff."[17] Like contract and other tariffs, incumbent LECs are not only bound to comply with the terms of the agreement with respect to the other party to that agreement, but must provide "any interconnection, service, or network element" on those same terms to any other requesting carrier. § 252(i); *AT&T Corp.*, 525 U.S. at 395-96. Like tariffs, interconnection agreements are "responsibilities imposed by the federal law, to the exclusion of all other ... obligation[s]" and implement duties that carriers have to serve classes of customers on terms that are non-discriminatory, just, and reasonable. *Louisville & Nashville R.R.* v. *Rice*, 247 U.S. 201, 203 (1918) (internal quotation marks omitted); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983) (per curiam) (Communications Act "tariffs are not simply contracts; they have the force of federal law"); *Fax Telecommunicaciones Inc.* v. *AT&T*, 138 F.3d 479, 488 (2d Cir. 1998); *accord Lowden* v. *Simonds-Shield-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) ("tariffs bind both carriers and shippers with the force of law").

C. The Doctrine Of Constitutional Avoidance Is Inapplicable.

Finally, even if petitioners' proposed interpretation were a possible and permissible one – as it is not – there is no basis for petitioners' claim that § 252(e)(6) should be construed narrowly to "avoid" issues under the Eleventh Amendment. Br. 27-28. Petitioners concede that § 252(e)(6) gives federal courts jurisdiction to review determinations made when agreements are initially approved, and making state commissions parties to these suits will present the same Eleventh Amendment issues that petitioners purport to seek to avoid, regardless of whether § 252(e)(6) is held to apply to determinations under § 252 that state commissions have

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[17] *See Competition In Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880 (1991) (authorizing contract tariffs).

deferred to future proceedings and made following the initial approval of the agreements. In deciding whether § 252(e)(6) requires the arbitrary distinction that petitioners urge, the only question should be whether that is required by the statute's text and is consistent with the Act as a whole and its structure, objects, and policies. For the reasons stated, it is not.

D. Section 252(e)(6) Grants District Courts The Jurisdiction To Resolve The Construction Of Interconnection Agreements.

Although the court of appeals correctly held that the district courts had jurisdiction to review the ICC's order under section 252(e)(6), it has also adopted what has aptly been termed an "absurd jurisdictional scheme." *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 498 n.2 (10th Cir. 2000). Under it, "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer 'no.'" Pet. App. 5a. This aspect of the Seventh Circuit's decision is erroneous.

The Seventh Circuit fashioned its bifurcated jurisdictional scheme because it believed that state law governs the interpretation of the agreements and the only federal question is whether the interpretation violates federal standards. That is wrong for two independent reasons. First, both "negotiated" and arbitrated agreements present federal questions under the act. See *supra* at 19-20, 25. Second, interconnection agreements are federal contracts. See *supra* at 33-35.

Further, even if state law did govern those agreements, and even if somehow there were no supplemental jurisdiction under 28 U.S.C. § 1367, that would be no impediment to a district court's review of the commission's interpretation of the agreement. First, the district court must interpret the interconnection agreement in order to perform its duty of

determining whether the agreement violates the Act. Thus, any alleged state-law question regarding the existence and meaning of the agreement "is a federal question," and the district court cannot "'surrender the duty to exercise [its] own judgment,'" although it may give weight to the state tribunal's views. *General Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992). Second, even if agreement interpretation were not itself a federal question, federal courts always have power to resolve state-law questions that are the predicates for determining questions of federal law. See, *e.g.*, *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 12-14 (1979).

II. THE ICC HAS WAIVED ITS SOVEREIGN IMMUNITY.

Petitioners contend that, if section 252(e)(6) is construed to grant the federal district courts jurisdiction to review state commission orders enforcing interconnection agreements, such review would violate sovereign immunity, which they claim that the ICC did not waive. Their argument is baseless.

It has long been the rule that "[a] State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, *or by otherwise waiving its immunity to suit in the context of a particular federal program*." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 n.1 (1985) (emphasis added). The petitioners seeks to evade this rule by claiming that this Court severely curtailed the power of Congress to elicit waivers of sovereign immunity by states that participate in federal programs in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); Br. 32-40, even though no federal program was at issue in that case. The petitioners misread *College Savings Bank*, which directly affirmed the power of Congress to elicit sovereign immunity waivers in the manner it did in the 1996 Act. As this Court has declared, "[t]here is no doubt ... that if the federal courts believe a state commission is not regulating in accordance with federal

policy [under the 1996 Act] they may bring it to heel." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999).

In *College Savings Bank*, this Court reaffirmed the longstanding rule that a state may waive its sovereign immunity, but emphasized that the waiver must be "altogether voluntary on the part of the sovereignty." 527 U.S. at 675 (internal quotation marks omitted). The issue in *College Savings Bank* was whether a state's participation in an activity *regulated by* federal law (in that case, the marketing in interstate commerce of prepaid college tuition plans) constituted voluntary waiver simply because Congress had authorized a private right of action in federal court against the state for violations of the Lanham and Trademark Remedy Clarification Acts. *Id.* at 671.

This Court held that the state did not waive its immunity merely by engaging in such federally regulated activity. *Id.* at 676-77. In so holding, the Court overruled *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), which had held that a state waives its immunity by operating a railroad subject to suit in federal court under the Federal Employers' Liability Act. 377 U.S. *id.* at 192-93. *Parden*-style waiver was impermissible, the Court held, because "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *College Savings Bank*, 527 U.S. at 680. Congress cannot make consent a precondition for a state to engage in "otherwise permissible activity," because exclusion of a state from such an activity is a "sanction" that coerces a state into consenting to suit. *Id.* at 687. Thus, in *College Savings Bank*, the Florida agency did not waive its immunity simply by engaging in commercial activity regulated by federal statute.

In rejecting "*Parden*-style waiver" – a term appearing three times in the majority opinion, see *id.* at 679, 681, 683, to describe waiver based on state engagement in federally regulated conduct – this Court took pains to distinguish the

"fundamentally different" implied waivers of state sovereign immunity that were effective because Congress had offered a "gratuity" to the States conditioned on a waiver of immunity. *Id.* at 686; *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d 636, 644 (5th Cir. 2001) (noting that *College Savings* "expressly overruled *Parden* and its 'constructive-waiver experiment [as] ill conceived,'" but did not forbid other forms of implied waiver) (quoting 527 U.S. at 680).

First, the Court reaffirmed the validity of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), which "held that a bistate commission which had been created pursuant to an interstate compact ... had consented to suit by reason of a suability provision attached to the congressional approval of the compact." *College Savings Bank*, 527 U.S. at 686. The implied waiver of sovereign immunity in *Petty* was valid because the states had no independent right to "form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *Id.*

Second, the Court noted that implied waiver of state constitutional immunities was firmly established by *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which held that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Savings Bank*, 527 U.S. at 686. Accordingly, the Court reaffirmed the rule of *Atascadero*, another Spending Clause case, that participation in a federal program constitutes consent to federal court jurisdiction if the statute "manifest[s] a clear intent to condition participation in the programs ... on a State's consent to waive its constitutional immunity," 473 U.S. at 247. See *College Savings Bank*, 527 U.S. at 678 n.2.

Thus, as the Fifth Circuit has held, agreeing with the Seventh and Tenth Circuits, the Court's discussion of those

cases in *College Savings Bank* affirmed the rule that "Congress may still obtain a non-verbal voluntary waiver of a state's Eleventh Amendment immunity, if the waiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on waiver of immunity." *AT&T Communications*, 238 F.3d at 645; *MCI II*, 222 F.3d 323, 340 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001); *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 937 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001). The Fifth Circuit has properly characterized *College Savings Bank* as establishing a three-part test for determining when a state's conduct will by implication constitute a voluntary waiver of sovereign immunity if the (1) the statute gives the state unambiguous notice that participation is conditioned on waiver; (2) nonparticipation would not exclude the state from activities otherwise lawfully within its powers; and (3) the state elects to engage in the conduct or transaction after such legal notice has been given. *AT&T Communications*, 238 F.3d at 644. Those three conditions have been amply met by the 1996 Act.

1. State participation in a federal program will constitute voluntary waiver so long as the federal statute "manifest[s] a clear intent to condition participation in the programs ... on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 238, 247. The 1996 Act clearly put state commissions on notice that their participation in the federal scheme was conditioned on submission to federal judicial review. Congress offered the state commissions broad regulatory authority over interconnection agreements in section 252, and then directly provided that its orders were reviewable "[i]n any case in which a State commission makes a determination" under section 252. § 252(e)(6). Because the petitioners had declared that they were exercising authority under 252 in issuing the enforcement order, and thus were "mak[ing] a determination under this section" within the

meaning of section 252(e)(6), they cannot reasonably claim that they lacked knowledge that they would be subject to suit under that statute for review of their enforcement decision. Thus, contrary to the petitioners' claim (Br. 30-31), the notice that voluntary participation in the section 252 federal scheme waives state sovereign immunity is in the statutory text, not simply implied by the statutory structure. The "'overwhelming implications from the text ... leave no room for any other reasonable construction.'" *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974).

> "Congress has expressed unmistakably that, under [the Act], states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewed in federal court" and that the "Act satisfies the requirement that Congress clearly state that participation by the state in the regulatory scheme entails a waiver of immunity from suit in federal court."

AT&T Communications, 238 F.3d at 646-47 (quoting *MCI II*, 222 F.3d at 341); see also *MCI Telecomms.*, 216 F.3d at 938.

The petitioners protests that section 252(e)(6) does not expressly provide that state commissions must be named as defendants. Br. 30-31. Although the state commission is not an indispensable party in review of orders enforcing interconnection agreements, see *Williams* v. *Fanning*, 332 U.S. 490, 494 (1947) (Postmaster General not an indispensable party in proceeding for review of his order if effective relief could otherwise be granted), the universal practice is that administrative agencies are always proper parties in actions for judicial review of their orders. See 5 U.S.C. § 703; *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 265 (1997); 14 Am. Jur. 2d *Certiorari* § 56 (2001) (under the writ of certiorari (the original writ for review of agency action) the agency is joined as a party in its own name). Indeed, the petitioners concede "that if § 252(e)(6) permits federal court

suits seeking review of interpretation and enforcement decisions, the petitioners should be a party to those suits." Br. 29 n.12.

Finally, the petitioners contend that Congress intended to abrogate state immunity, not elicit a waiver, because the 1996 Act was passed before this Court ruled in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that Congress lacked power under the Commerce Clause to abrogate state sovereign immunity. Br. 32. Even if there were any validity to this point, it would be irrelevant, for so long as the statute may be construed to elicit waiver, that construction should be adopted. *Hooper* v. *California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). But the petitioners' point has no validity. All duties and obligations that the Act imposes upon state commissions are consensually undertaken, for the Tenth Amendment prohibits Congress from commandeering state agencies to implement federal law. This principle was established by this Court's decision in *New York* v. *United States*, 505 U.S. 144, 166 (1992), and Congress clearly structured the 1996 Act to comport with that precedent. Thus, the only reasonable reading of the 1996 Act is that state participation in the section 252 scheme is voluntary and that consent to federal jurisdiction under section 252(e)(6) is a condition of that voluntary participation.

2. State participation in the regulatory scheme of the 1996 Act is a gratuity because it requires Congress's authorization, which Congress was free to withhold. The Commerce and Supremacy Clauses allow Congress to preempt state regulation of telecommunications entirely. *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982); *MCI Telecomms.*, 216 F.3d at 938. Congress chose to preserve certain areas of state authority in the spirit of "cooperative federalism," *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); see, *e.g.*, §§ 251(d)(3), 252(e)(3), 253(b), 261(c), but

it "unquestionably" took away from the states the independent power to regulate "the matters addressed by the 1996 Act." *AT&T Corp.*, 525 U.S. at 379 n.6. Congress thus federalized the regulation of local competition under the Act, and did not, as the petitioners contends, merely attempt "to influence, to varying degrees, the States' own exercise of their pre-existing authority." Br. 35. Indeed, the federal gratuity of section 252 power broadened the state commission's power in certain respects, giving them an interstate as well as intrastate jurisdiction. *Local Competition Order* ¶ 84; JA 58a & n.14.

Because Congress could have reserved the administration of the new federal regulatory scheme to the FCC alone, the power to implement section 252 of the Act is a gratuity to the states to which Congress may attach the condition of waiver of sovereign immunity. As in *Petty* and *Dole*, Congress was under no obligation to offer states something they could not obtain on their own, *viz.*, participation in the 1996 Act's federal regulation of local telecommunications competition. Also, as in those cases, the state was free to accept or reject such participation as a gratuity without abstaining from any lawful activity within its power. *AT&T Communications*, 238 F.3d at 646; *accord MCI Telecomms.*, 216 F.3d at 938; *MCI II*, 222 F.3d at 343-44.

3. Acceptance of this legislative bargain was and is voluntary. If the state commission opts not to perform any responsibility under section 252, including enforcement of interconnection agreements, the FCC "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." § 252(e)(5).

The petitioners claims that the statutory scheme is coercive because "federal regulatory power created this precondition for waiver," Br. 38, and that withholding consent would require it to abandon the regulation of telephone carriers that it has conducted for 90 years. *Id.* at 39. That claim is overstated; the petitioners would forego only the regulation of

Section 252 interconnection agreements between competing carriers (arrangements that were created by the federal Act), not its traditional regulation of carriers' provision of telephone service to the public. But in any event, this Court directly rejected such arguments in *FERC* v. *Mississippi*, where Congress put the states to the choice of considering federal standards or suffering preemption of their traditional power to regulate utilities. 456 U.S. at 765. This Court acknowledged that utility regulation was "an area of overriding concern" to the States, and that "the choice put to the States – that of either abandoning regulation of the field altogether or considering the federal standards – may be a difficult one." *Id.* at 766. But Congress may use its power "to induce state action" in ways it could not mandate directly, and there was no unconstitutional coercion in legislation "affecting their freedom to make decisions in areas of integral governmental functions." *Id.* (internal quotation marks omitted); *Alden* v. *Maine*, 257 U.S. 706, 755 (1999) ("the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits"). Because the ICC could have opted out of the section 252 program (as the Virginia Corporation Commission did), it was not subject to federal coercion. See *New York*, 505 U.S. at 167-68.

Finally, there is no merit to the petitioners' claim that its consent was not voluntary because state law obliges it to participate in the federal program. Br. 37. The ICC cannot claim at once to be the state for purposes of the Eleventh Amendment and to be subject to the external compulsion of state law. In any event, state law in this context is irrelevant; in federal programs, whether statutory conditions are met, and sovereign immunity waived, is a question of federal law. *Petty*, 359 U.S. at 278-79; *Atascadero*, 473 U.S. at 238 n.1. The ICC does not claim that it lacked legislative authorization to participate in the § 252 program; the state legislature specifically declared that "it is in the immediate interest of the People of the State of Illinois to exercise its rights within the

new framework of federal telecommunications policy." 220 Ill. Comp. Stat. 5/13-102. The ICC cannot exercise rights under the 1996 Act and yet refuse to accept the duties the Act imposes. By freely accepting the role that Congress offered state commissions under the 1996 Act, the ICC "assume[d] the conditions that Congress under the Constitution attached." *Petty*, 359 U.S. at 281-82. The ICC waived its sovereign immunity.

III. THE ICC COMMISSIONERS ARE SUBJECT TO FEDERAL JURISDICTION UNDER *EX PARTE YOUNG*.

Regardless of whether the ICC itself is subject to suit, the district court had jurisdiction under *Ex parte Young*, 209 U.S. 123, 156-60 (1908), to enforce the 1996 Act by ordering injunctive and declaratory relief against the ICC's *individual* members in their official capacities. See *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d 636, 647 (5th Cir. 2001); *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867-68 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000). *Ex parte Young* allows such suits when (1) "a plaintiff alleges an ongoing violation of federal law," and (2) "the relief sought is prospective rather than retrospective." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 294 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring) (emphasis in original omitted); *accord id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). *Ex parte Young* jurisdiction is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984). Indeed, this Court recently reaffirmed that *Ex parte Young* remains an "essential ... part of our sovereign immunity doctrine," and "suits for declaratory or injunctive relief against state officers must ... be permitted if [federal law] is to remain the supreme law of the land." *Alden*, 527 U.S. at 747, 748.

The petitioners claim that *Ex parte Young* does not extend to state officers who "in the course of resolving disputes within [their] jurisdiction" render decisions that are alleged to conflict with federal law, and relies on a purported "general rule" from *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), that "a claim of error" in the officer's exercise of authority will not deprive him of immunity. See Br. 42-45.

The petitioners misread *Larson*.[18] In that case, the plaintiff sued a federal officer for an injunction preventing the officer from selling to others coal that the plaintiff had allegedly bought from the government. This Court identified "two types" of cases in which suit can be brought to restrain the conduct of a government official. 337 U.S. at 690. The first is where, by his own actions, the officer acts as an individual. If he "is not doing the business which the sovereign has empowered him to do or he is doing it in a way the sovereign has forbidden," his acts are *ultra vires*, *id.* at 690, and he may be sued in his *individual capacity*. But to bring suit on this basis, the plaintiff must show "a lack of delegated power," and not merely "a claim of error in the exercise of that power." *Id.* at 689. The *ultra vires* rationale for restraining the conduct of government officers has nothing to do with *Ex parte Young*. The parallel claim is that a state officer is acting

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[18] To the extent the ICC may be understood to claim that state officers acting in a quasijudicial capacity are not subject to the equitable powers of federal district court, that is not the law. *See, e.g., Juidice* v. *Vail*, 430 U.S. 327 (1977) (suit against state court judge to enjoin state court proceedings under an exception to the Anti-Injunction Act); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (suit challenging state officer's administrative adjudication of welfare benefits); *Ex parte Virginia*, 100 U.S. 339, 349 (1879). Moreover, the ICC also exercises a quasilegislative authority under section 252, given its ratemaking authority and the regulatory discretion it exercises to impose terms and conditions in interconnection agreements. *See* 47 U.S.C. § 252(b), (d). *Cf. Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 388-90 (1894) (*Ex parte Young* jurisdiction over commissioners to review rate determinations).

ultra vires his state law authority. No such claim is made here, and indeed this Court held that such a claim cannot be the basis of *Ex parte Young* jurisdiction. *Pennhurst*, 465 U.S. at 113.

The second and distinct category is where the officer is claimed to be "acting unconstitutionally or pursuant to an unconstitutional grant of power." *Larson*, 337 U.S. at 691; *Dalton* v. *Specter*, 511 U.S. 462, 472 (1994) ("unconstitutional and ultra vires conduct" are "separate categories"). In such a situation, the individual officer acts in his official capacity, but he cannot claim the power of the sovereign because the sovereign cannot confer authority to act contrary to the Constitution. All *Ex parte Young* claims are of this kind, and hence are official-capacity suits. *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.14 (1985). Because conduct contrary to federal statute violates the Supremacy Clause, *Maryland* v. *Louisiana*, 451 U.S. 725, 760 (1981); *Swift & Co.* v. *Wickham*, 382 U.S. 111, 125 (1965); *Federal Land Bank* v. *Board of County Commissioners*, 368 U.S. 146, 156 (1961), and negates any claim of state sovereign authority, *Ex parte Young* jurisdiction may be invoked against state officers to vindicate federal statutory rights. *Quern* v. *Jordan*, 440 U.S. 332, 346-48 (1979); *Swift*, 382 U.S. at 114, 129 (holding, in rejecting statutory jurisdiction of a three-judge district court, that the single-judge district court had jurisdiction over the suit against a state officer for violation of federal statute). Under this basis of *Larson*, *Ex parte Young* may be invoked to correct the wrongful acts of state officials, not simply acts taken under invalid statutory authority. *Greene* v. *Louisville & Interurban R.R.*, 244 U.S. 499, 507 (1917). "[W]here state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief." *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932).

Moreover, the petitioners misconceive the claims of carriers seeking judicial review under section 252(e)(6). They do not sue simply to correct interpretive error, but to prevent the enforcement of allegedly unlawful interconnection agreement terms imposed upon them by the state commissioners in violation of the Act. Cf. *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 230 (1908) ("when the rate is fixed, a bill against the commission to restrain the members from enforcing it will not be bad ... as a suit against a State, and will be the proper form of remedy"); *Shields* v. *Utah Idaho Cent. R.R.*, 305 U.S. 177, 183-84 (1938). Because the allegedly unlawful interconnection agreement terms have prospective force, *Ex parte Young* jurisdiction is proper to cure the ongoing effects of the commissioners' violation of federal law. *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977); *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986).

The petitioners also make the odd claim that by authorizing "judicial review" under section 252(e)(6), Congress thereby precluded injunctive or declaratory relief. Br. 45. First, *Ex parte Young* jurisdiction is the traditional form of judicial review of state commission actions in federal courts, and it can hardly be said that Congress intended to prohibit it in a statutory provision entitled "Review of State commission action."[19] Second, the fact that under statutory review a district court need not invoke the nonstatutory writs, and may simply "remand" to the agency, is of no moment. Remands are no less coercive in the relevant sense, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) (the agency is "bound to act upon the correction" of law by the agency), but regardless injunctions are always available even in federal statutory review of agency orders. See, *e.g.*, *National Mining*

[19] *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 344 n.4 (1951) (rejecting challenge by state public service commissioners to federal judicial review of commission orders "in view of the many cases prior to and following *Ex parte Young*, in which this Court has granted such relief over the same objection") (citation omitted).

Ass'n v. *United States Army Corps of Eng'rs*, 145 F.3d 1399, 1408-10 (D.C. Cir. 1998); 28 U.S.C. § 1651.

Equally unfounded is the petitioners' claim that the single sentence in § 252(e)(6) authorizing judicial review is "'a detailed remedial scheme,'" Br. 45, preclusive of *Ex parte Young* jurisdiction, much like the statutory scheme at issue in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 75-76 (1996). There is no comparability. The statute at issue in *Seminole Tribe*, the Indian Gaming Regulatory Act ("IGRA"), obligated states to negotiate a regulatory compact with Indian tribes wishing to develop gaming enterprises on tribal lands within the state, 25 U.S.C. § 2710(d)(3), and provided a judicial right of action for a tribe to compel the state to negotiate in good faith, *id.* § 2710(d)(7)(A)(i) & (B)(i). See 517 U.S. at 49. Once the jurisdiction of the district court is invoked, other provisions of IGRA "describe an elaborate remedial scheme designed to ensure the formation of a Tribal-State compact." *Id.* at 50. Because certain of the remedies authorized against the State—such as statutory mediation for violations of court orders to negotiate a compact—were inconsistent with normal con-tempt sanctions that would be available in a suit against the officers, the Court concluded that Congress intended to prohibit the Tribe from invoking *Ex parte Young* to enforce the statute. See *id.* at 75-76. The Court cautioned, however, that its holding was limited to the statute before it, and that it did not hold that every limited remedial scheme in a statute foreclosed *Ex parte Young* actions. *Id.* at 75 n.17.

By contrast, section 252(e)(6) does no more than provide a right of review in federal court. It does not speak to the issue of what relief a district court may order if it finds a violation, much less create an "intricate remedial scheme," *id.* at 74, of special post-judgment statutory relief that might conflict with traditional equitable relief. Judicial review is always an exercise of equitable jurisdiction, and, absent any express statutory limitation on the relief a court may order, the full panoply of equitable remedies available in any judicial review

proceeding must be presumed available here. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992). Congress did not bar the district court from exercising *Ex parte Young* jurisdiction.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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ADDENDUM

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of January 14, 1997

by and between

AMERITECH INFORMATION INDUSTRY SERVICES,

a division of Ameritech Services, Inc. on behalf of and as agent for Ameritech Illinois

and

AT&T COMMUNICATIONS OF ILLINOIS, INC.

* * * * * * * * * * *

21.2 Renegotiation of Prices and Terms.

21.2.1 Renegotiation of Prices. Notwithstanding anything to the contrary contained herein, either Party may require negotiations of one or more of the rates, prices, and charges of the services to be provided under this Agreement to be effective on the date three (3) years after the Effective Date (the **"Price Renegotiation Date"**). Such negotiations shall be requested by delivery of written notice at least one-hundred twenty (120) days prior to the Price Renegotiation Date. In addition, if negotiations are required by a Party, the other Party may include as part of the negotiations any other rates, prices and charges of this Agreement which relate to those the other Party has requested be negotiated. If the Parties are unable to satisfactorily negotiate such rates, prices and charges within ninety (90) days of such written notice, the procedures set forth in ***Section 21.2.3*** shall be followed.

21.2.2 Renegotiation of Terms. Notwithstanding anything to the contrary contained herein, either Party may

require negotiations of one or more of the rates, prices, charges, terms and conditions of the services to be provided under this Agreement effective upon expiration of the Initial Term or any Renewal Term. Such negotiations shall be requested by delivery of written notice at least one hundred twenty (120) days prior to the expiration of such Initial Term or Renewal Term. In addition, if negotiations are required by a Party, the other Party may include as part of the negotiations any other rates, prices, charges, terms, and conditions of this Agreement which relate to those the other Party has requested be negotiated. If the Parties are unable to satisfactorily negotiate such new rates, prices, charges, terms or conditions within ninety (90) days of such written notice, the procedures set forth in ***Section 21.2.3*** shall be followed.

21.2.3 Resolution of Unsatisfactorily Negotiations. If the Parties are unable to satisfactorily negotiate rates, prices, charges, terms and conditions pursuant to ***Section 21.2.1*** or ***21.2.2***, either Party may petition the Commission or take such other action as may be necessary to establish appropriate terms. If prior to the (i) Price Renegotiation Date, if pursuant to ***Section 21.2.1*** or (ii) applicable expiration date, if pursuant to ***Section 21.2.2***, the Parties are unable to mutually agree on such new prices or terms or the Commission does not issue its order, the Parties agree that the rates, prices, charges and/or terms ultimately ordered by such Commission or negotiated by the Parties shall be effective retroactive to such Price Renegotiation Date or expiration date, as the case may be.

* * * * * * * * * * *

29.3 Amendment or Other Changes to the Act; Reservation of Rights. The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date. In the event of any amendment of the Act, or any final and nonappealable legislative, regulatory, judicial order, rule or regulation or other legal action that revises or reverses the Act, the FCC's First Report and Order in CC Docket Nos. 96-98 and 95-185 or any applicable Commission order or arbitration award purporting to apply the provisions of the Act (individually and collectively, an **"Amendment to the Act"**), either Party may be providing written notice to the other Party require that the affected provisions be renegotiated in good faith and this Agreement be amended accordingly to reflect the pricing, terms and conditions of each such Amendment to the Act relating to any of the provisions in this Agreement. If any such amendment to this Agreement affects any rates or charges of the services provided hereunder, each Party reserves its right and remedies with respect to the collection of such rates or charges on a retroactive basis; including the right to seek a surcharge before the applicable regulatory authority.

29.4 Regulatory Changes. If any final and nonappealable legislative, regulatory, judicial or other legal action (other than an Amendment to the Act, which is provided for in ***Section 29.3***) materially affects the ability of a Party to perform any material obligation under this Agreement, a Party may, on thirty (30) days' written notice (delivered not later than thirty (30) days following the date on which such action has become legally binding and has otherwise become final and nonappealable), require that the affected provision(s) be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new provision(s) as

may be required; *provided* that such affected provisions shall not affect the validity of the remainder of this Agreement.

29.5 Proxy Rates. In the event the initial rates under this Agreement are "proxy rates" established by the FCC or the Commission, the Parties are to substitute rates later established by the FCC or Commission under procedures consistent with the Act and any Order of the FCC or Commission.